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90-1755

Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RABEN-PASTAL, a Joint Venture,
comprised of RABEN BUILDERS, INC. and
PASTAL CONSTRUCTION COMPANY,

Petitioners,

v.

CITY OF COCONUT CREEK, a Florida
Municipal Corporation, and JAMES COWLEY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

GREENBERG, TRAURIG, HOFFMAN,
LIPOFF, ROSEN & QUENTEL, P.A.
Byron G. Petersen, Esq.
Attorneys for Petitioners
500 East Broward Boulevard
Suite 1350
Fort Lauderdale, Florida 33394
(305) 765-0500

QUESTIONS PRESENTED FOR REVIEW

(1) Whether, as found by the jury below, the City of Coconut Creek ("City") is liable under *42 U.S.C. § 1983* for the unconstitutional acts of its chief building official ("Chief Building Official") in refusing to lift stop-work orders after buildings were fully repaired, where a reviewing tribunal, the Board of Rules and Appeals (the "Board"), had no policies or standards available to it by which to measure the Chief Building Official's policy decisions?

(2) Whether the City is liable for the unconstitutional acts of the Chief Building Official because the Board, the *de jure* final policymaker, expressly delegated its final policymaking authority to the Chief Building Official?

(3) Alternatively, whether as a result of the Board's review and approval of the unconstitutional actions of the Chief Building Official and the basis for them, the City is liable because the unconstitutional acts were ratified by the Board?

(4) Whether despite the jury's determination of liability, the Chief Building Official is, as a matter of law, immunized from individual liability for his unconstitutional acts simply because the City was held not to be liable.

(5) Whether a set-off of $1,051,000 from a jury award of $2.5 million under *§ 1983* was unconstitutional in impermissibly rewarding a party who intentionally violates a party's constitutional rights?[1/] See *Dobson v. Camden*, 705 F.2d 759 (1983), *aff'd*, 725 F.2d 1003 (5th Cir. 1984) (*en banc*).

1/ Petitioner reserves the right to argue Question 5 in the event certiorari is granted on the earlier questions, but does not include Question 5 as an independent ground for the grant of certiorari.

LIST OF PARTIES

The parties to the proceedings below and before this Court are Petitioner, Raben-Pastel, and Respondents, The City of Coconut Creek, a Florida municipal corporation, and James Cowley.

Petitioner, Raben-Pastal, is a joint venture comprised of Raben Builders, Inc. and Pastal Construction Company, both Florida corporations. Raben Builders, Inc. and Pastal Construction Company do not have any parents or subsidiaries to list pursuant to Rule 28.1.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

OPINIONS BELOW xi

JURISDICTION xii

STATUTES AND ORDINANCES INVOLVED xiii

STATEMENT OF THE CASE AND FACTS 1

REASONS FOR GRANTING THE WRIT 6

I. INTRODUCTION: THE FLORIDA SUPREME COURT'S DECISION PERMITS THE FLORIDA COURTS TO IMPERMISSIBLY EVADE THEIR CONSTITUTIONAL OBLIGATION TO APPLY *§ 1983* TO MUNICIPALITIES AND MUNICIPAL OFFICIALS ... 6

II. THE FLORIDA SUPREME COURT'S DECISION FINDING NO MUNICIPAL LIABILITY FOR THE UNCONSTITUTIONAL ACTS OF THE CHIEF BUILDING OFFICIAL IN REFUSING TO LIFT STOP-WORK ORDERS AFTER BUILDINGS WERE FULLY REPAIRED CONFLICTS WITH THE DECISIONS OF THIS COURT IN *PRAPROTNIK* 10

A. The City Is Liable Under *42 U.S.C. § 1983* Because The Chief Building Official's Decisions Were Not Subject To Meaningful Review By The Board Of Rules And Appeals, The Tribunal The Florida Supreme Court Determined Was The *De Jure* Final Policymaker. There Were No Standards Against Which The Board Could Measure The Chief Building Official's Actions And, Accordingly, The Chief Building Official Under *Praprotnik*, Made The Sole And Final Unconstitutional Policy 10

B. Even If The Board Of Rules And Appeals Could Provide Meaningful Review, It Expressly Delegated Its Authority To The Chief Building Official. He Was The *De Facto* Final Policymaker In The City Of Coconut Creek Concerning The Lifting Of Stop-Work Orders. 11

C. If The Board Could Provide Meaningful Review And The Board Did Not Delegate Its Authority, The Board Ratified The Chief Building Official's Unconstitutional Acts By Approving His Decisions. Accordingly, The Board's Actions Are The Acts Of The City Under *§ 1983* 17

III. THE FLORIDA SUPREME COURT'S DECISION REGARDING THE INDIVIDUAL LIABILITY OF THE CHIEF BUILDING OFFICIAL CONFLICTS WITH THE DECISION OF THIS COURT IN *WOOD V. STRICKLAND*, 420 U.S. 308, 95 S.CT. 992, 43 L.E.2D 214 (1975). THE CHIEF BUILDING OFFICIAL IS LIABLE INDIVIDUALLY UNDER *§ 1983* FOR HIS UNCONSTITUTIONAL ACTS REGARDLESS OF WHETHER LIABILITY ALSO SHOULD BE IMPOSED UPON THE CITY 18

CONCLUSION 19

APPENDIX A-1

TABLE OF AUTHORITIES

Page

CASES

City of St. Louis v. Praprotnik,
485 U.S. 112, 108 S. Ct. 915,
99 L. Ed. 2d 107 (1988) 3, 4, 8, 9, 10, 11, 12, 15, 17

Dobson v. Camden,
705 F.2d 759 (1983), *aff'd*, 725 F.2d 1003
(5th Cir. 1984) 2

Hill v. Department of Corrections,
513 So.2d 129 (1987), *cert. denied*,
484 U.S. 1064, 108 S. Ct. 1024,
98 L. Ed. 2d 989 (1988) 7

Howlett by and through Howlett v. Rose,
110 S. Ct. 2430, 50 U.S.L.W. 4755,
110 L. Ed. 2d 332 (1990) 7, 16

Howlett by Howlett v. Rose,
537 So.2d 706 (Fla. 2d DCA), *cert. denied*,
554 So.2d 1367 (Fla. 1989) 7

Mandell v. Doe,
888 F.2d 783 (11th Cir. 1989) 12

Monell v. New York City Dept. of Social Services,
436 U.S. 658, 98 S. Ct. 2018,
56 L. Ed. 2d 611 (1978) 7

Page

Parker v. Williams,
862 F.2d 1471 (11th Cir. 1989) 12

Parratt v. Taylor,
451 U.S. 527 (1981) 2

Raben-Pastal v. City of Coconut Creek,
545 So.2d 885 (Fla. 4th DCA 1989) 8, 9, 19

Raben-Pastal v. City of Coconut Creek,
573 So.2d 298 (Fla. 1990) 9, 17

Raben-Pastal v. City of Coconut Creek,
Case No. 82-22427 (CL Polen/Farrington) 9

United States District Court for the Eastern District of Pennsylvania in Plunto v. Wallenstein,
1989 U.S. Dist. Lexis 9579 (August 10, 1989),
aff'd, 914 F.2d 244 (3d Cir. 1990) 17

Williams v. Butler,
863 F.2d 1398 (8th Cir. 1988) 12

Wood v. Strickland,
420 U.S. 308, 95 S. Ct. 992, 43 L.E.2d 214
(1975) 9, 19

Page

STATUTES

28 U.S.C. § 1257 10

42 U.S.C. § 1983 . . . . . 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, 15, 16, 18, 19, 20

MISCELLANEOUS

South Florida Building Code, Chapter 305 14

South Florida Building Code, Section 203 12

IN THE SUPREME COURT OF THE UNITED STATES

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City of Coconut Creek, a Florida
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner, Raben-Pastal, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Florida Supreme Court which was entered on February 12, 1991.

OPINIONS BELOW

The Opinion of the Supreme Court of Florida is reported at 573 So.2d 298, and is contained in the Appendix hereto, p. A-2-18, *infra*. *Raben-Pastal v. City of Coconut Creek*, 573 So.2d 298 (Fla. 1990).

The Opinion of the Fourth District Court of Appeals of Florida, which contains its Order on Rehearing, is reported at 545 So.2d 885, and is contained in the Appendix hereto, p. A-19-37, *infra*. *Raben-Pastal v. City of Coconut Creek*, 545 So.2d 885 (Fla. 4th DCA 1989).

The Judgment Notwithstanding the Verdict of the Circuit Court in and for the Seventeenth Judicial Circuit in and for Broward County, Florida was not reported. A copy is contained in the Appendix hereto, p. A-38-40, *infra*. *Raben-Pastal v. City of Coconut Creek*, Case No. 82-22427 (CL Polen/Farrington).

The Order Granting Renewed Motion for Directed Verdict in the Circuit Court action was not reported. A copy of the Order is contained in the Appendix hereto, p. A-41-43, *infra*. *Raben-Pastal v. City of Coconut Creek*, Case No. 82-22427 (CL Polen/Farrington).

The jury verdict in the Circuit Court action was not reported. A copy of the jury verdict is contained in the Appendix hereto, p. A-44-46, *infra*. *Raben-Pastel v. City of Coconut Creek*, Case No. 82-22427 (CL Polen/Farrington).

JURISDICTION

Petitioner brought this suit in the Circuit Court in and for Broward County, Florida. Petitioner alleged claims against Respondents, City of Coconut Creek and its Chief Building Official, James Cowley, under *42 U.S.C. § 1983.* On January 27, 1986, the jury after trial entered a verdict for Petitioner and against both Respondents under *§ 1983* for $2.5 million. On August 8, 1986, the Circuit Court entered Judgment Notwithstanding the Verdict for both Respondents.

Petitioner appealed the Judgment Notwithstanding the Verdict ("J.N.O.V.") to the Fourth District Court of Appeal of Florida. On January 25, 1989, the Fourth District entered a Judgment and an Opinion affirming the Circuit Court's J.N.O.V. On Petitioner's Motion for Rehearing, the appellate court certified the following question to the Florida Supreme Court as a matter of great public importance:

> May a municipality be held liable to an owner/developer of a building project under *42 U.S.C. Section 1983* for the wrongful refusal of the municipality's chief building official to withdraw a stop-work order on the project?

On December 6, 1990, the Florida Supreme Court answered the certified question in the negative relieving the municipality and its Chief Building Official from liability under *42 U.S.C. § 1983.* Rehearing was denied on February 12, 1991.

The jurisdiction of this Court to review the Judgment of the Florida Supreme Court is invoked pursuant to *28 U.S.C. § 1257.*

STATUTES AND ORDINANCES INVOLVED

The jury's verdict against the City and Chief Building Official was predicated on *42 U.S.C. Section 1983* which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or District Court of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .."

With respect to the policymaking authority of the Chief Building Official, Section 201.1(b) of the South Florida Building Code ("Building Code") provides that:

> "[the] Chief Building Official is hereby authorized and directed to interpret and enforce all the provisions of this Code subject to the powers vested in the Board of Rules and Appeals as set forth in Section 203."

With respect to the Chief Building Official's authority in the imposition and lifting of stop-work orders, Section 201.3 entitled: "STOP-WORK ORDERS" provides:

> Whenever any building work is being done contrary to the provisions of this Code, or is being done in an unsafe or dangerous manner, the Chief Building Official may order such work

stopped . . . and such persons shall immediately stop such work until arrangements, in compliance with the provisions of the Code and satisfactory to the Chief Building Official, have been made, at which time he may authorize the work to proceed.

With respect to the authority of the Board, established under Chapter 203 of the Building Code, Section 203.4(b) entitled "Interpret Code at Request of Building Official", provides: "The Board shall pass on all matters pertaining to this Code and referred to the Board by the Chief Building Official for interpretation or clarification.

STATEMENT OF THE CASE AND FACTS

Petitioner seeks certiorari review of the Judgment of the Supreme Court of Florida which held that neither a municipality nor its chief building official could be held liable under *42 U.S.C. § 1983* to an owner-developer of a building project for the wrongful refusal of the municipality's chief building official to withdraw a stop-work order on a project.

The facts from which this action arose have never been disputed at any time since the jury's verdict. The Chief Building Official of the City of Coconut Creek, James Cowley, refused to lift stop-work orders on two permitted mid-rise buildings being constructed by Petitioner in a large multiphase condominium development. The Chief Building Official, who was not an engineer or architect, wrongfully and willfully refused to lift the stop-work orders despite the fact that reputable professional engineers, specifically retained by him to inspect the buildings and supervise modifications, had certified to him that the buildings had been put into full compliance with the Building Code. He never contested the certifications but speculated, on the basis of no facts whatsoever, that there still might be a problem of some sort somewhere. He further contended that the Building Code required that he be "satisfied" and that he was the sole judge of his own satisfaction. His decisions were brought before the Board of Rules and Appeal on two occasions during the events in question to no avail.

The unjustified refusal of the Chief Building Official to lift the stop-work orders was so reprehensible that the jury below found that he violated Petitioner's constitutional rights and returned its verdict of 2.5 Million Dollars against both the City and the Chief Building Official. *Appendix, p. A-44-46, infra.* In so doing, the jury found that: (a) the Chief Building Official acted in "violation of the constitu-

tional rights" of Petitioner and his "conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known"; *Appendix, p. A-44, infra*; and (b) that the Chief Building Official's actions represented "an official policy, custom, or practice of the City".[2/] *Appendix, p. A-45, infra.*

Six months after the jury was discharged, the trial court entered a Judgment Notwithstanding the Verdict ("J.N.O.V.") in favor of both the Chief Building Official and the City on the ground that recovery was precluded by the Court's decision in *Parratt v. Taylor,* 451 U.S. 527 (1981). Petitioners appealed to the Fourth District.

The sole liability issue on appeal was whether the trial court was correct in having applied the preclusive doctrine of *Parratt v. Taylor.* The City did not cross-appeal or in any manner challenge the instructions given to the jury or the jury's findings in connection with the issue of municipal liability. The issue of whether the Chief Building Official was the final policymaking authority for the City regarding stop-work orders was simply never pressed during post-trial proceedings or raised on appeal to the Fourth District.

However, instead of deciding the *Parratt* issue, the Fourth District, after submission of all the parties' briefs, raised a separate issue regarding the Chief Building Official's final authority, five months after oral argument (and three years after the jury's decision on the issue) and concluded (after requiring supplemental briefs while the case was under submission) that a municipality cannot under

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2/ It is important to note in connection with the issues presented herein that the jury had before it the record of the proceedings before the Board of Rules and Appeals involving the dispute.

any circumstances be liable for the unconstitutional actions of its Chief Building Official, *citing City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988).

After so holding, the Fourth District certified the issue to the Florida Supreme Court. Despite repeated representations by all municipal officials during the actual events in question that the "final policymaking authority" regarding stop-work orders resided in the Chief Building Official, the Supreme Court of Florida held that, as a matter of law, such authority rested with the Board.[3/] Accordingly, finding that the chief building official was not the municipality's "final policymaking authority" regarding stop-work orders, the Supreme Court of Florida affirmed the Judgment Notwithstanding the Verdict.

The Florida Supreme Court held that the Board of Rules and Appeals,[4/] not the Chief Building Official, was the *de jure* final policymaker under the dictates of *Praprotnik*, simply because the South Florida Building Code

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3/ Even the Board, who the Florida Supreme Court concluded was, as a matter of law, the 'final policymaking authority', had ruled that the 'ultimate' authority regarding stop-work orders rested with the Chief Building Official.

4/ Under the South Florida Building Code, Coconut Creek had the option of forming its own Board or utilizing the County Board. It chose the latter procedure. Thus, when the County Board sits to consider a particular matter in a particular municipality, it sits for all intents and purposes as the Board for that particular city. Were it otherwise, Broward County would unwittingly become a defendant in any *42 U.S.C. § 1983* actions involving building construction regulation within the many municipalities in the county.

provided that the Chief Building Official's decisions were subject to review by that Board. It did not consider: (a) whether the Board had policies available to it by which to measure the Chief Building Official's actions; (b) whether the Board expressly delegated *de facto* authority to the Chief Building Official; or (c) whether as the *de jure* authority, the Board had ratified the Chief Building Official's unconstitutional acts.

In so holding, the Florida Supreme Court implicitly determined that it was not required by *Praprotnik* to consider all elements of this Court's tests for determining municipal liability and therefore did not consider the overwhelming and uncontradicted evidence that the Chief Building Official's unconstitutional acts were the acts of the City:

THE UNCONTRADICTED EVIDENCE

The City Commission and City Manager Acknowledge and Defer to the Chief Building Official's Final Authority: During the time construction was halted due to the Chief Building Official's refusal to lift the stop-work orders, Petitioner repeatedly sought relief from the City Manager and City Council. At each juncture, Petitioner was informed that, as provided in the Building Code, the Chief Building Official alone had final authority over construction within the municipal confines of Coconut Creek[2/] (P. Ex. 71; Stewart Jan. 9. T. 92; P. Ex. 65, P. Ex. 64, Cochenour Jan. 8

2/ Unless otherwise indicated, all emphasis is supplied. "R" refers to the record on appeal, which includes portions of the trial transcript. "T" refers to portions of the trial transcript. Plaintiffs' or Defendants' "Ex" refers to the Trial Exhibits, a list of which is contained at pages 2301 to 2313 of the record on appeal below.

T. 8, Cowley Jan. 13 T. 181-184). As the Chief Building Official himself unequivocally stated during trial:

> Q. Mr. Cowley, was there anyone other than yourself in the City of Coconut Creek that established policy and procedure with respect to the administration and enforcement of the South Florida Building Code?
>
> A. No.

(Cowley Jan. 13 T. 184).

Involvement of the Board of Rules and Appeals: The Broward County Board of Rules and Appeals twice rejected Petitioner's request to overturn the Chief Building Official's decisions not to lift the stop-work orders despite the fact the buildings had been fully repaired. The Board at the conclusion of the first hearing on July 30, 1981, resulting in a transcript of 122 pages, ruled that it would not interfere with the unlimited discretion granted the Chief Building Official by the South Florida Building Code, thereby delegating any residual power the Board had directly to the Chief Building Official:

> Bd. Attorney Robert Ziegler: "Under the [South Florida Building] Code the final decision is the Building Official's". (D. Ex. 1 Tr. p. 93)
>
> Motion of the Board: Whereas the ultimate responsibility of the job belongs to the building official and the city, . . . I move the Board support the action of the building official. (July 30, 1981 B.R.A. Tr. p. 120 Defendant's Joint Ex. 1)

At the second hearing on November 12, 1981, the Broward County Board of Rules of Appeals again rejected Petitioner's request to overturn the Chief Building Official's decision not to lift the stop-work orders. At this hearing, resulting in a transcript of 31 pages, the Board did not expressly say that the Building Official was the ultimate authority, as it had done at the first hearing. It simply approved the Chief Building Official's decision on the basis of the record before it.[6/]

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION: THE FLORIDA SUPREME COURT'S DECISION PERMITS THE FLORIDA COURTS TO IMPERMISSIBLY EVADE THEIR CONSTITUTIONAL OBLIGATION TO APPLY *§ 1983* TO MUNICIPALITIES AND MUNICIPAL OFFICIALS.

Although this Court over 12 years ago held that a municipality is a "person" under *§ 1983* and may be financially responsible for an unconstitutional tort which was

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6/ **The Circuit Court's Involvement:** Petitioners also sought mandamus in the Circuit Court of Broward County. The City defended by asserting that the South Florida Building Code vested sole discretion in the Chief Building Official and that his determination was final and unreviewable by the judiciary. The Court agreed and held, as a matter of law, that the conditions imposed were strictly up to the Chief Building Official.

The Chief Building Official finally relented and lifted the stop-work orders on November 2 and December 15, 1981 only after Petitioners announced that they were considering demolition of the buildings because of the extensive delays and the building official's intractable position (Plaintiffs' Exs. 121-22).

caused by an official government "policy, custom, or practice," *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), Florida courts have been extremely reluctant to permit application of *§ 1983*'s protections in state court.

In 1987, the Florida Supreme Court held that Florida's statutory waiver of sovereign immunity applied only to state court tort actions and therefore concluded that state governmental entities enjoyed a blanket immunity from civil rights actions under *§ 1983. See Hill v. Department of Corrections,* 513 So.2d 129 (1987), *cert. denied*, 484 U.S. 1064, 108 S.Ct. 1024, 98 L.Ed.2d 989 (1988). Thereafter, the Second District Court of Appeal of Florida relied upon *Hill* and held that a federal civil rights action under *§ 1983* against a local school board could not be brought in state court as a result of Florida's sovereign immunity. See *Howlett by Howlett v. Rose,* 537 So.2d 706, 707-08 (Fla. 2d DCA), *cert. denied*, 554 So.2d 1367 (Fla. 1989).

This Court accepted certiorari jurisdiction of that decision and reversed the decision of the Second District. *Howlett by and through Howlett v. Rose,* 110 S.Ct. 2430, 50 U.S.L.W. 4755, 110 L.Ed.2d 332 (1990). Stating that the Second District's holding "raises the concern that the state court may be evading federal law and discriminating against federal causes of action," *110 S.Ct., at 2437*, the Court held that the Florida court's refusal to exercise its concurrent jurisdiction over *§ 1983* actions violated the Supremacy Clause. *Id.* at 2446.

The proceeding presented in this Petition is the first opportunity the Florida Supreme Court has had to consider the scope of municipal liability under *§ 1983* since this Court's admonitions in *Howlett*. Unfortunately, the record below amply demonstrates that the Florida Supreme Court

remains extremely reluctant to apply *§ 1983* in state court proceedings.

This Court in *Praprotnik* candidly cautioned that "it may not be possible to draw an elegant line that will resolve [the] conundrum" between a "mere exercise of discretion" resulting in impermissible *respondeat superior* liability and an attempt by government to insulate itself from liability by delegating final policymaking authority to a subordinate. 108 S.Ct., at 915. The Florida Supreme Court here, on the other hand, had no such difficulties. It has established a "bright line" test: If there is a reviewing body established by law, a municipality can never be liable under *§ 1983*, regardless of whether: (a) the reviewing board has available to it any meaningful guidelines against which the subordinate municipal official's actions (policies) can be measured; (b) the reviewing board exercised its chartered task of review or left the matter entirely in the hands of the municipal official whose policies were supposed to be reviewed, i.e., delegated its final policymaking authority to the subordinate; or (c) the review board considered the municipal official's decision and the basis for it, thereby ratifying such actions. In other words, according to the Florida Supreme Court if a procedural right of review by an administrative tribunal of a municipal official's decision exists that is the end of the analysis and municipal liability will never attach.

This interpretation of *Praprotnik* by the Florida Supreme Court in *Raben-Pastal* flies directly in the face of the clear dictates of *Praprotnik*, 108 S.Ct., at p. 924-28. The action of the Board of Rules and Appeals below was not a matter of "simply going along with discretionary decisions made by one's subordinates." There were no code provisions against which the Chief Building Official's "satisfaction" could be measured. Even if there were, the Board, according to its own pronouncements, considered the Chief Build-

ing Official to be the "final policymaking authority" on the issue of when "arrangements" were sufficiently "satisfactory" that stop-work orders would be lifted. This is delegation, not mere deference. Moreover, during presentations to the Board, the basis for the Chief Building Official's decisions was discussed and debated. Thus, either the Board delegated the final decision to the Chief Building Official as they were told by their attorney that Board precedent required, or there was a ratification. In either case, municipal liability attaches under *Praprotnik*. There can be no alternative -- no middle ground -- by which the City can escape its wrongs.

The Florida Supreme Court also erroneously held that the municipal official whose action is challenged is immune from liability under *§ 1983* for his unconstitutional conduct apparently on the rationale that he did not possess "final policymaking authority". The lower court did not cite any precedent for the startling proposition that the Chief Building Official was immunized from *§ 1983* liability despite the jury's findings that he knew that his "conduct violated clearly established rights" . . . simply because he lacked "final policymaking authority".

Accordingly, the decision of the Florida Supreme Court directly conflicts with the holdings of this Court in *Praprotnik* as to municipal liability and *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.E.2d 214 (1975), as to individual liability. The Court should grant certiorari jurisdiction and hear this case on the merits.

II. THE FLORIDA SUPREME COURT'S DECISION FINDING NO MUNICIPAL LIABILITY FOR THE UNCONSTITUTIONAL ACTS OF THE CHIEF BUILDING OFFICIAL IN REFUSING TO LIFT STOP-WORK ORDERS AFTER BUILDINGS WERE FULLY REPAIRED CONFLICTS WITH THE DECISIONS OF THIS COURT IN *PRAPROTNIK.*

A. The City Is Liable Under *42 U.S.C. § 1983* Because The Chief Building Official's Decisions Were Not Subject To Meaningful Review By The Board Of Rules And Appeals, The Tribunal The Florida Supreme Court Determined Was The *De Jure* Final Policymaker. There Were No Standards Against Which The Board Could Measure The Chief Building Official's Actions And, Accordingly, The Chief Building Official Under *Praprotnik*, Made The Sole And Final Unconstitutional Policy.

Under *Praprotnik*, a municipality is not subject to liability under *§ 1983* for the discretionary decisions of a subordinate official if his decisions are constrained by municipal policies not of that official's own making. See *Praprotnik*, 108 S.Ct., at 926. That is far from the case here.

Under the Code, the Chief Building Official can decline to lift stop-work orders unless "arrangements in compliance with the Code and satisfactory to the building official have been made." There are absolutely no standards, guidelines, or policies in the Code against which the Chief Building Official's "satisfaction" can be measured.

The conjunctive language of this provision, "and satisfactory to the building official", indicates that the building official may require something more than that repairs be made. The Chief Building Official obviously thought so. However, what these additional requirements might consist of is anybody's guess. Thus, the Chief Building Official's decision is not "constrained by policies not of that official's making" as this Court in *Praprotnik* found would be necessary in order to avoid municipal liability. A reviewing Board has no such standards to apply. The Florida Supreme Court's conclusion, therefore, that the existence of a review board relieves the City of responsibility is complete form over substance. The fact that a review board was created is not, as that court found, the end of the required analysis, it is only the beginning.

Moreover, and as more thoroughly discussed below, either because the Board was aware of this constraint on its review powers or through a longstanding tradition of delegation, a tradition having the force and effect of law, members of the Board did not purport to question the Chief Building Official's "satisfaction." Consequently, their decision to leave matters of "satisfaction" to the very person the Building Code says must be satisfied is hardly surprising.

B. Even If The Board Of Rules And Appeals Could Provide Meaningful Review, It Expressly Delegated Its Authority To The Chief Building Official. He Was The *De Facto* Final Policymaker In The City Of Coconut Creek Concerning The Lifting Of Stop-Work Orders.

Even if the Board had, by some stretch of the imagination, some policy by which to measure the Chief Building Official's "satisfaction" and thereby was the *de jure* final

policymaker, the Florida Supreme Court declined to address the uncontradicted evidence which established that the Board, on behalf of the City, delegated such final policymaking authority to the Chief Building Official. The delegation exception carved out by this Court in *Praprotnik* is a most important deterrent to attempts by government to escape liability under *§ 1983*. As stated by this Court: "If . . . a city's lawful policymakers could insulate the government from liability simply by delegating their policymaking authority to others, *§ 1983* could not serve its intended purpose." *Praprotnik*, 108 S.Ct., at 925.

Although this Court has not expounded upon the delegation exception to *§ 1983* liability since *Praprotnik*, that exception has been applied by a number of lower federal courts. See, e.g., *Mandell v. Doe*, 888 F.2d 783, 794 (11th Cir. 1989) (acts of deliberate indifference of physician's assistant with respect to medical care at prison would be attributed to County so as to establish municipal liability because he had been delegated the final policymaking authority); *Williams v. Butler*, 863 F.2d 1398, 1402-03 (8th Cir. 1988) (*en banc*) (city liable under *§ 1983* for act of municipal judge in illegally firing municipal court clerk; it had delegated absolute authority to such judge for hiring and firing his personnel) *Parker v. Williams*, 862 F.2d 1471, 1478 (11th Cir. 1989) (county was liable under *§ 1983* for actions of county sheriff in hiring and promoting chief jailer who subsequently kidnapped and raped an arrestee even though it did not exercise direct control over county sheriff). Each of these courts found delegation on a record much less compelling than that present here.

A virtual avalanche of admissions by the Chief Building Official and other municipal officials established that the City had delegated its final policymaking authority regarding stop-work orders to Respondent, Cowley. As early as 1980,

the Chief Building Official had informed Petitioner that he alone was in charge of building code matters and was expected to establish policy and procedure in the area. (Cowley Jan. 13 T. 181-184). His understanding of his authority to establish policy did not waver during trial:

> Q. Mr. Cowley, was there anyone other than yourself in the City of Coconut Creek that established policy and procedure with respect to the administration and enforcement of the South Florida Building Code?
>
> A. No.

(Cowley Jan. 13 T. 184).

His ultimate authority regarding stop-work orders remained constant during the period of time giving rise to this litigation and clearly was so understood by everyone. For example, the City Manager demanded that the Chief Building Official notify him of the reasons for a stop-work order prior to its imposition on any project in the City (Cochenour Jan. 8 T. 25), but he responded in writing as follows:

> To: James Cochenour
> From: James Cowley
> Subject: Policy Work Stoppages, etc.
>
> * * *
>
> The second part (of your request) would relate to stop-work orders, red tags, suspension of permits or any provision, for that matter, concerning the South Florida Building Code. Unfortunately, in this area, the law is quite specific in that the building official is the principal enforcing officer

> of the Code which precludes explanations or evaluations being required by second or third parties.

(Plaintiffs' Ex. 65) (emphasis added)[2/]

The City's delegation of final policymaking authority with respect to stop-work orders was also established by the Chief Building Official's cavalier treatment of the City Council. Although the City Council clearly had higher authority than the Chief Building Official on virtually any other matter, it apparently lacked authority to take any action regarding stop-work orders. Petitioner earlier had sought City Council intervention regarding aspects of its first phase of development, but the City Manager formally advised it that no one, including the Council, had control or authority over the Chief Building Official regarding the Building Code:

> I am denying this request [to be placed on the City Council Agenda] per *South Florida Building Code, Chapter 305.3* which states that any request of this type rests solely with the Building Official at his own discretion.

(Plaintiffs' Ex. 68). Subsequently, when Petitioner sought action by the City Council to lift the stop-work orders

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2/ The City Manager made it quite clear that he was 'not by any stretch of the imagination holding [himself] up as a decision maker in these matters. . . .' (Plaintiffs' Ex. 64). The City Manager reemphasized his complete lack of authority during trial when he testified that the South Florida Building Code was not his bailiwick, but the Chief Building Official's. (Cochenour Jan. 8 T.8).

imposed by Cowley, its request similarly was rebuffed. (Plaintiffs' Ex. 71).

The long time City Attorney, Paul Stewart, further confirmed that the Chief Building Official held the final policymaking authority under *Praprotnik*'s test for municipal liability under *§ 1983*. The City Attorney testified during trial:

> Q. Who had the ultimate say so on building matters within the City of Coconut Creek in 1981?
>
> A. Mr. Stewart: As building official, Mr. Cowley had the ultimate authority to make such a decision.

(Stewart Jan. 9 T. 92).

Finally, and most importantly in connection with the issues raised in this petition, the Board of Rules and Appeals operated with the firm understanding that the Chief Building Official had ultimate authority. When Petitioner first went before the Board to contest the failure to lift the stop-work orders, the Board's long standing attorney, Robert Ziegler, Esq., advised the Board that "under the [South Florida Building] Code the final decision is the Building Official's." (July 30, 1981 B.R.A. Tr. p. 93, Defendants' Joint Ex. 1). The resulting motion made at that meeting and passed by the Board confirmed this:

> Whereas the ultimate responsibility of the job belongs to the building official and the City, and since the Board has been previously admonished by the courts for not supporting the building offi-

> cial, I move the Board support the action of the building official.

(July 30, 1981 B.R.A. Tr. p. 120 Defendant's Joint Ex.1)

During Petitioner's subsequent attempt to obtain the Board's intervention in their dispute with the Chief Building Official, the City Attorney heatedly reminded the Board that it had previously decided that only the Chief Building Official had final decision-making authority on the issue and that the Board was without authority to act contrary to his wishes. (November 12, 1981 B.R.A. Defendants' Joint Ex. 1).

It is difficult to imagine a stronger case of *de facto* delegation than that shown here -- all the officials involved, including those who the Florida Supreme Court stated were the "final policymakers", represented and acted on their understanding that the Chief Building Official, not them, was the "ultimate" authority regarding stop-work orders. Clearly, therefore, this is not a case where the Florida Supreme Court faced a difficult factual issue or encountered a problem applying disputed facts to the applicable rule of law. Instead, the Florida Supreme Court decision in this case effectively evaded this Court's dictates regarding the enforcement of *§ 1983* actions in state court. Accordingly, as it did in *Howlett*, this Court should exercise its discretionary certiorari jurisdiction to address this issue.

C. If The Board Could Provide Meaningful Review And The Board Did Not Delegate Its Authority, The Board Ratified The Chief Building Official's Unconstitutional Acts By Approving His Decisions. Accordingly, The Board's Actions Are The Acts Of The City Under *§ 1983.*

In *Praprotnik*, this Court noted that a municipality's authorized policymaker would be bound by a subordinate's decision if it exercised its authority to measure the official's conduct for conformance with its policy. *Praprotnik*, 108 S.Ct., at 926. However, this Court did not elaborate at any length on the issues of what degree or quality of review must be undertaken in order for ratification to arise. Though this Court clearly stated in *Praprotnik* that there is a difference between mere acquiescence, i.e. "simply going along", and actual review and ratification, what that difference is needs this Court's analysis and exposition. Here the Florida Supreme Court noted that the Chief Building Official's decisions were subject to review, *Raben-Pastal*, 573 So.2d at 301-02, and the record establishes that his decisions were in fact reviewed. With that the court found no municipal liability could attach.

In stark contrast to this approach is the decision of the United States District Court for the Eastern District of Pennsylvania in *Plunto v. Wallenstein*, 1989 U.S. Dist. Lexis 9579 (August 10, 1989), *aff'd*, 914 F.2d 244 (3d Cir. 1990). There the court specifically noted that this Court had "carved out two 'exceptions' where a municipality could be found liable even if the action is taken by an individual other than the final policymaker." 1989 U.S. Dist. Lexis 9579, at p. 7. Applying the ratification exception, the lower federal court held that since a subordinate warden's policymaking decisions were subject to review by the Prison Board and were

in fact reviewed, "their ratification of [the warden's decisions] is chargeable to [the county] because the decision of the Prison Board is final". 1989 U.S. Dist. Lexis 9579, p. 9.

Petitioner respectfully submits that this case provides an excellent record and opportunity for this Court to provide much needed guidance to the lower courts at all levels and across all concurrent jurisdictions.

The Board heard evidence regarding the basis for the Chief Building Official's conduct at both their hearings on July 30 and November 12, 1981. However, in contrast to the initial meeting of July 30, 1981, the Board at its November 12, 1981 meeting did not expressly state (as it did at the first meeting) that it could not intervene since the Chief Building Official was the final policymaking authority. Instead, it approved the Chief Building Official's decision on motion after hearing each side's position. Therefore, as a matter of law, the Board ratified the Chief Building Official's decision not to lift the stop-work orders and the City is bound thereby under *§ 1983*.

III. THE FLORIDA SUPREME COURT'S DECISION REGARDING THE INDIVIDUAL LIABILITY OF THE CHIEF BUILDING OFFICIAL CONFLICTS WITH THE DECISIONS OF THIS COURT. THE CHIEF BUILDING OFFICIAL IS LIABLE INDIVIDUALLY UNDER *§ 1983* FOR HIS UNCONSTITUTIONAL ACTS REGARDLESS OF WHETHER LIABILITY ALSO SHOULD BE IMPOSED UPON THE CITY.

Although the unassailed evidence established that the Chief Building Official violated Petitioner's rights under *§ 1983*, both the Florida Fourth District and Florida Supreme Courts relieved him from individual liability under

§ 1983. The lower courts' rationale was not recited in any opinion. Nevertheless, it could only have flowed from an improper analysis that since the Chief Building Official lacked sufficient "final policymaking authority" to subject the City to liability for his acts, this relieved him as well from his constitutional torts.

This result in *Raben-Pastal* conflicts with every decision of this Court. See, e.g., *Wood*, 420 U.S., at 321-22. The decision permits a person to violate *§ 1983* with impunity and emerge unscathed despite his constitutional violations.

Henceforth in Florida, a person whose civil rights are violated under *§ 1983* may fear to sue the municipality which employs the subordinate official for fear that if the plaintiff fails to establish his claim against the municipality the guilty person will also go unpunished. This "chilling effect" is wholly unsupported by the law or language of *§ 1983*. The Chief Building Official is directly responsible for his unconstitutional conduct under *§ 1983*, regardless of whether liability could be imposed upon the City. Because of the importance of this issue to rights under *§ 1983* and consistency in the law, the Court should grant certiorari.

CONCLUSION

Everyone in the City of Coconut Creek believed, acted, and regarded the City Building Official as having final policymaking authority -- the City Building Official himself, the City Attorney, the City Manager and the City Council. When the controversy made its way to the Board of Rules and Appeals, that Board acting for the municipality, also regarded the City Building Official as the final arbiter. The City Attorney repeatedly stated to the Board that the City Building Official was the final authority and his unconstitutional deprivation thus swept through the Board un-

checked. When presented with the facts, the jury below found without hesitation what everyone already knew -- the City Building Official was the final policymaker regarding stop-work orders for the City. Nevertheless, despite all of this, the reviewing courts of Florida inexplicably found to the contrary.

The threat of damage actions under *§ 1983* has played an important role in curbing both governmental brutality and corruption. Like Damocles' sword, damage actions have done much to make men act properly. If the federal cause of action under *§ 1983* is allowed to remain construed by Florida's courts as affording no remedy, officials such as Chief Building Official will be allowed to run rampant and virtually unchecked. The record cries out for a reversal lest one more constitutional deprivation pass unnoticed as the law of the land.

Wherefore, Petitioners, Raben-Pastal, respectfully requests that the Court grant their Petition for Writ of Certiorari and direct the parties to submit briefs on the merits.

Respectfully submitted,

GREENBERG, TRAURIG,
HOFFMAN, LIPOFF, ROSEN &
QUENTEL, P.A.
Byron G. Petersen, Esq.
Attorneys for Petitioner
500 East Broward Boulevard, Ste. 1300
Fort Lauderdale, Florida 33394
Telephone: (305) 765-0500

By: _____
BYRON G. PETERSEN
FLORIDA BAR NO. 220434

APPENDIX TO INITIAL BRIEF OF PETITIONERS

TABLE OF CONTENTS:

1. Opinion of Supreme Court of Florida entered February 12, 1991.

2. Opinion of the Fourth District Court of Appeal of January 25, 1989 and Certification and Rehearing Dated June 14, 1989

3. Final Judgment

4. Order Granting Renewed Motion for Directed Verdict of August 8, 1986

5. Jury Verdict of January 27, 1986

RABEN-PASTAL, etc., et al.,
Petitioners,

v.

CITY OF COCONUT CREEK, Florida, etc., et al., Respondents.

No. 74406.

Supreme Court of Florida.

Dec. 6, 1990.

Rehearing Denied Feb. 12, 1991.

Developers brought civil rights action against city and building official who refused to withdraw stop work order on their project. The Circuit Court, Broward County, set aside jury verdict in favor of developer, and entered judgment in favor of building official and city. The District Court of Appeal, 545 So.2d 885, affirmed, and certified question. The Supreme Court, Kogan, J., held that: (1) building official did not possess the type of policy-making authority that would make city liable for his actions in view of fact that his actions were subject to review by Board of Rules and Appeals, and (2) building official's decision not to lift particular stop work order did not constitute an official policy formulated by the city.

Question answered in negative and opinion of the District Court of Appeal approved.

1. Civil Rights ⇐244

Jury is not to be given discretion to determine which officials hold senior level positions in the government such that their actions can be said to represent a decision of the government itself for purposes of civil rights liability; question is a legal matter to be resolved by the court before case is submitted to the jury. 42 U.S.C.A. § 1983.

2. Civil Rights ⇐206(3)

For civil rights liability to attach to local government, it must be shown that governmental official or employee caused the deprivation of one's constitutional rights by acting pursuant to official governmental policy; local government also can be found liable if violation of constitutional rights was caused by government official or employee acting in accordance with governmental custom, even though custom had not been formally sanctioned or ordered. 42 U.S.C.A. § 1983.

3. Civil Rights ⇐206(3)

In order for decision of government agent on a single occasion to establish an unconstitutional policy for which local government can be held liable, it must be shown that municipality officially sanctioned or ordered the action, that the action was taken by municipal official with final policy-making authority, and that the challenged action was taken pursuant to policy adopted by those officials responsible under state law for establishing policy in that area of the government's business. 42 U.S.C.A. § 1983.

4. Civil Rights ⇐206(3)

City building official did not possess the type of policy-making authority with respect to decision not to withdraw a stop work order on a building project for which city could be held liable for violation of civil rights, as the decision made by the building official was a matter regulated by the South Florida building code and thus subject to review by Board of Rules and Appeals. 42 U.S.C.A. § 1983.

5. Civil Rights ⇐206(3)

Building official's decision not to lift stop work order on a project, which was made specifically in response to particular circumstances of the construction project, did not represent official policy formulated by the city for which it could be held liable under federal civil rights statute. 42 U.S.C.A. § 1983.

Byron G. Petersen and Marlene K. Silverman of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Fort Lauderdale, and Sam Daniels of Daniels & Hicks, P.A., Miami, for petitioners.

Robert H. Schwartz of Gunther & Whitaker, P.A., Fort Lauderdale, for respondents.

KOGAN, Justice.

We have for review *Raben-Pastal v. City of Coconut Creek*, 545 So.2d 885 (Fla. 4th DCA 1989), in which the district court on rehearing certified the following as a question of great public importance:

> May a municipality be held liable to an owner-developer of a building project under 42 U.S.C. section 1983 for the wrongful refusal of the municipality's chief building official to withdraw a stop-work order on the project?

Id. at 890. We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. We answer the question in the negative as to this case [1] and approve the decision of the district court.

1. Although the question presented is broadly phrased, we limit our discussion to the facts of this case. Whether or not a municipality would be subject to liability under 42 U.S.C. § 1983 under other circumstances than those presented here is a matter left for another day.

In 1981, petitioners Raben–Pastal began construction of a residential project in the City of Coconut Creek, Florida. After cracks appeared in several of the buildings and remedial efforts failed to eliminate them, the city's chief building officer, James Cowley, issued an official stop-work order pending implementation of agreed repairs. An engineering firm retained by the city approved repair plans to correct the cracks. On July 2, 1981, the engineering firm officially certified to the city that the repairs were complete. Cowley, however, refused to lift the stop-work order for the next five months due to his concerns that other structural defects might exist. During this time, petitioners twice filed appeals to the Broward County Board of Rules and Appeals in addition to filing a petition for writ of mandamus in the United States District Court in an effort to have the stop-work order lifted.

During the five-month interim between certification and lifting of the stop-work order, media coverage of the dispute suggested that the unoccupied, unfinished buildings were unsafe. The project eventually was closed down by petitioners. As a result, petitioners sued the City of Coconut Creek and James Cowley, as chief building official, under 42 U.S.C. § 1983 for violation of its civil rights.[2]

2. Petitioners also sued those responsible for the cracks in the buildings for design negligence. Prior to trial the parties settled for $1,051,000.00.

[1] At trial a jury returned a verdict in favor of petitioners in the amount of $2.5 million. In a special verdict, the jury concluded that Cowley intentionally violated and/or misapplied the provisions of the South Florida Building Code or acted in an arbitrary, capricious, and unreasonable manner in refusing to lift the stop-work order. The jury further found that Cowley's actions represented an official policy, custom, or practice of the City of Coconut Creek. In post-trial proceedings the trial court set aside the jury verdict and entered judgment in favor of Cowley and the City of Coconut Creek.[3] Relying on *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), the trial court held that petitioners had an adequate remedy at state law and therefore were precluded from recovery under § 1983.

3. In *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S.Ct. 915, 924, 99 L.Ed.2d 107 (1988), the Supreme Court has stated that while identification of policymaking officials is a question of state law, it is not a question of federal law and not a question of fact in the usual sense. *Id.* at 124, 108 S.Ct. at 924. A jury is not to be given the discretion to determine which officials hold senior-level positions in the government such that their actions can be said to represent a decision of the government itself. *Id.* at 126, 108 S.Ct. at 925. The question is a legal matter to be resolved by the trial court before the case is submitted to the jury. Thus the trial court was correct to set aside that portion of the jury verdict and make this determination itself.

On appeal, the Fourth District Court of Appeal held that under the circumstances, the trial court properly concluded that the City of Coconut Creek was not responsible under § 1983 for the building official's conduct. In reaching its decision, the appellate court relied on *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), and *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988), two cases addressing municipal liability under § 1983. The fourth district held that the building official did not possess the type of policy-making authority necessary to make the City of Coconut Creek liable for his actions under the federal statute. On rehearing, the appellate court certified the question we now have before us.

[2] In *Monell v. Department of Social Services*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978), the Supreme Court first determined that a municipality or other body of local government was subject to liability under § 1983. For liability to attach, it must be shown that a government official or employee caused a deprivation of one's constitutional rights by acting pursuant to official government policy. A local government also could be found liable if a violation of constitutional rights was caused by a government official

or employee acting in accordance with governmental custom even though the custom had not been formally sanctioned or ordered. *Id.* at 690–691, 98 S.Ct. at 2035–2036.

[3] Later, in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), the Supreme Court addressed the question of when a decision on a single occasion is sufficient to establish an unconstitutional policy for which the city could be held liable. In answering this question, the Court set forth the following guidelines: 1) the municipality must have officially sanctioned or ordered the action; 2) the action must have been taken by a municipal official with final policy-making authority, and 3) the challenged action must have been taken pursuant to a policy adopted by those officials responsible under state law for establishing policy in that area of the government's business. *Id.* at 481–483, 106 S.Ct. at 1299–1300. The Court went on to emphasize that determining whether an official has final policy-making authority is a question of state law. *Id.* at 483, 106 S.Ct. at 1300.

In an attempt to clarify its prior holding in *Pembaur*, the Supreme Court revisited the *Pembaur* issue in the case of *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988). Praprotnik was an architect employed by the City of St. Louis in a management-level position who, after appealing a temporary suspension to the city's civil service commission, was transferred to a clerical position in another city agency and subsequently laid off. Praprotnik brought a § 1983 action against the city, claiming his first amendment rights were violated through retaliatory actions taken in response to his appeal and that he was denied due process by the layoff. He prevailed in the trial court, and the Eighth Circuit Court of Appeals affirmed, finding that the jury had implicitly determined Praprotnik's layoff stemmed from an unconstitutional city policy. *Praprotnik v. City of St. Louis*, 798 F.2d 1168 (8th Cir.1986). The court of appeals defined a "policy-maker" as one whose employment decisions are final in the sense that the decisions are not subject to de novo review by higher-ranking officials. *Id.* at 1175. Thus, the court concluded that the City of St. Louis could be held liable under § 1983 for personnel decisions made by city supervisors. *Id.*

The Supreme Court reversed and attempted to clarify the principles established in *Pembaur*. The Court focused on the role of state law in identifying which official or body has the responsibility for making law or setting policy in the various areas of a local government's business and made it clear that in most instances state law would direct a court to the proper authority. *City of St. Louis v. Praprotnik*, 485 U.S. at 124–126, 108 S.Ct. at 924–925. In any event, the question is one of state and local law to be determined by the trial court, not a question of fact to be determined by the jury. *Id.* at 124, 108 S.Ct. at 924. Before concluding that Praprotnik had failed to establish an unconstitutional policy or to demonstrate that the employees responsible for the layoff were municipal policy-makers, the Supreme Court emphasized that simply going along with discretionary decisions made by subordinates would not be viewed as a delegation to them of the authority to make policy. *Id.* at 130, 108 S.Ct. at 927. Rather, for a delegation of policymaking authority to have occurred, it must be clear that a subordinate's discretionary decision was not constrained by official policies and was not subject to review. *Id.* at 127, 108 S.Ct. at 926.

[4] With these principles in mind, the district court examined the regulation of building and development projects in Broward County and found that these projects generally are governed by the South Florida Building Code.[4] Section 201.1(a)(1),

4. The district court noted that the South Florida Building Code was enacted by the Florida Legislature and contains comprehensive and detailed provisions for regulating construction. The Building Code was incorporated into the Broward County Charter to achieve uniformity and quality in the building industry. The parties do not dispute that its provisions govern Raben-Pastal's project.

South Florida Building Code, sets forth the powers and duties of the building official. This section designates the building official as the principal-enforcing officer of the Building Code and as coordinator of work performed by all subordinate inspectors. The Building Code does vest the building inspector with the power to impose stop-work orders when the building official or an authorized representative determines work is being performed contrary to the provisions of the Code or in an unsafe or dangerous manner. § 201.1(a)(4), South Florida Building Code. Furthermore, once building work is in compliance with the Building Code to the building official's satisfaction, the official may lift the stop-work order and authorize the work to proceed. *Id.* However, the Building Code also provides that *any* decision made by the building official on matters regulated by the

Code is subject to review by the Board of Rules and Appeals upon written application to the Secretary of the Board.[5] After reviewing the applicable provisions of the Building Code, we believe the district court correctly concluded that the building official did not possess the type of policy-making authority that would make the City of Coconut Creek liable for his actions.

5. Moreover, the Building Code recognizes that alternatively or in addition to the above stated procedure, an aggrieved party may seek action in the form of injunctive-relief proceedings or other appropriate legal proceedings in a court of competent jurisdiction. § 203.4(g), South Florida Building Code. In the event an aggrieved party first seeks review of the building official's decision by the Board of Rules and Appeals and receives an unfavorable result, that party then may apply to the appropriate court for a writ of certiorari. § 203.7(a), South Florida Building Code. However, application for review must be made to the proper court within five days after the decision of the Board. § 203.7(b), South Florida Building Code.

Imposing and lifting stop-work orders are matters regulated by the South Florida Building Code. Therefore, a decision by the building official affecting a stop-work order is not final because it is subject to review by the Board. As the district court noted, the provisions of the Building Code set forth the City's policy for regulating construction. Not only does the Code provide guidelines for those responsible for its implementation, but more importantly, it specifically denies the building official final policy-making authority over construction projects through the review process. Under the dictates of *Praprotnik*, the building official does not meet the criteria of a final policy-maker.

[5] We recognize that under the Building Code the building official is left with some discretion when making decisions. Because each construction project is unique, the building official's discretion is necessary to address varying circumstances likely to arise with respect to a particular project. However, this is not to say that the building official's performance of his duties is tantamount to final policy-making authority. Having the authority to make discretionary decisions is not the same as having the authority to make policy. The building official's decisions are not final and unreviewable. Additionally, we fail to see how the building official's deci-

sion not to lift the stop-work order, made specifically in response to the particular circumstances of petitioners' construction project, represents an official policy formulated by the City of Coconut Creek. As the district court concluded:

> We also do not believe that the action of other city officials in "simply going along" with the building official's decision on the stop-work orders constituted a delegation of policy-making authority sufficient to make the city liable under section 1983 as construed in *Praprotnik*. As noted above, the city's policy is contained in the Building Code, and the Code itself provides for another body's supervision of the building official's actions. There was no claim or evidence presented at trial of prior instances of abuse of authority that would demonstrate a de facto policy of the city sanctioning misconduct by the building official. Thus, although it appears that the building official may have acted improperly, it does not appear that his actions were related to any improper policy of the city, nor were they part of a series of wrongful acts tacitly approved as policy by the city. Under these circumstances we believe the trial court properly concluded that the city was not responsible under section 1983 for the building official's conduct.

Raben-Pastal v. City of Coconut Creek, 545 So.2d at 889.

Thus, unless it can be demonstrated that the guiding principles established in *Praprotnik* apply to action taken by a municipal official or employee, the municipality cannot be held liable for the conduct under 42 U.S.C. § 1983. Petitioners have failed to show that Cowley possesses final authority to establish municipal policy with respect to the alleged constitutional violation. Under the provisions of the South Florida Building Code, Cowley does not have final policy-making authority over the action alleged to have caused the constitutional violation nor was he carrying out an official policy of the city when he denied petitioner's request to lift the stop-work orders.[6] Accordingly, we answer the question as to this case in the negative and approve the opinion of the Fourth District Court of Appeal.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, EHRLICH, BARKETT and GRIMES, JJ., concur.

6. We decline to address the other issues raised by the parties to this action because those issues lie beyond the scope of the certified question.

RABEN–PASTAL, a joint venture comprised of Raben Builders, Inc., and Pastal Construction Company, Appellants,

v.

CITY OF COCONUT CREEK, Florida, a Florida municipal corporation and James Cowley, Appellees.

No. 4–86–2096.

District Court of Appeal of Florida, Fourth District.

Jan. 25, 1989.

On Rehearing June 14, 1989.

In construction project owner's § 1983 action, the Circuit Court for Broward County, Otis Farrington, J., set aside jury verdict for owners against city and its chief building official, and project owners appealed. The District Court of Appeal, Anstead, J., held that city was not responsible under § 1983 for building official's conduct.

Affirmed.

1. Civil Rights ⇐13.7

City's chief building officer did not possess the kind of policy-making authority that would make city liable, under § 1983, for his actions in refusing to lift stop-work order on project until five months after city engineer had certified that repairs were complete. 42 U.S.C.A. § 1983.

2. Civil Rights ⇐13.7

Action of city officials in "simply going along" with building official's reason to lift stop-work order did not constitute delegation of policy-making authority sufficient to make city liable under § 1983 to owners of project. 42 U.S.C.A § 1983.

3. Damages ⇐63

Municipal defendants were entitled to set-off in § 1983 action because of settlements plaintiff had made with other defendants prior to trial, in light of claim of joint liability against municipal defendants and settling defendants for failure of the project. 42 U.S.C.A. § 1983.

Kendall B. Coffey and Byron G. Petersen of Greenberg, Traurig, Askew, Hoffman, Lipoff, Rosen & Quentel, P.A., and Sam Daniels of Daniels & Hicks, P.A., Miami, for appellants.

Robert H. Schwartz of Gunther & Whitaker, P.A., Fort Lauderdale, for appellees.

ANSTEAD, Judge.

This is an appeal from a post-judgment order setting aside a jury verdict for appellants in their federal civil rights action against the appellees. We affirm.

In 1981 Raben-Pastel commenced construction of a multiple-phase residential project in the City of Coconut Creek. After remedial efforts failed to eliminate cracks that had appeared in several of the buildings, the city's chief building officer, James Cowley, issued official stop-work orders on the affected buildings pending implementation of agreed repairs. Subsequently, an engineering firm retained by the city as a special consultant and inspector for the project, approved repair plans to correct the cracks. On July 2, 1981, the engineering firm officially certified to the city that the repairs were complete. Notwithstanding the city engineer's certification, Cowley refused to lift the stop-work order for some five months. During that time, Raben-Pastel twice filed appeals to the Broward County Board of Rules and Appeals in addition to filing a petition for writ of mandamus in the United States District Court.

During the five-month interim between certification and the eventual lifting of the stop-work order, media coverage of the dispute suggested that the unoccupied, unfinished buildings were unsafe. The project was eventually closed down by appellants. Subsequently, Raben–Pastel sued the entities allegedly responsible for the cracks in the buildings for design negligence and the City of Coconut Creek and James Cowley, as its chief building official, under 42 U.S.C. section 1983 for violation of its civil rights. It was claimed that the cracks, the arbitrary delay in restarting the project, and the attendant publicity over the safety of the project caused it to fail. Prior to trial Raben–Pastel settled with everyone but the city and Cowley.

A jury rendered a verdict for appellants, and, in a special verdict, concluded that Cowley "intentionally violated and/or misapplied the provisions of the South Florida Building Code or acted arbitrarily, capriciously and unreasonably" in refusing to lift the stop-work order. The jury further found that Cowley's actions were representative of "an official policy, custom or practice of the City of Coconut Creek."

However, in post-trial proceedings, the trial court set aside the jury verdict and entered judgment in favor of Cowley and the city based on its conclusion that Raben–Pastel had: 1) a procedural rather than a substantive due process claim; and 2) an adequate remedy at law thereby precluding it from recovery under section 1983.[1] The court also held that Cowley and the City were entitled to a set-off in the section 1983 action because of settlements Raben–Pastel had made with the other defendants prior to trial.

1. The trial court cited *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) and *City of Lake Worth v. Walton*, 462 So.2d 1137 (Fla. 4th DCA 1984) as authority for its ruling. In *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), the court held that an action by a state prisoner to recover for a hobby kit ordered by the prisoner that was allegedly lost by prison officials constituted a procedural due process claim. The Supreme Court held that because the state provided a claims procedure by which the prisoner could have obtained compensation for his loss and because the loss had resulted from a random and unauthorized act by a prison employee, the prisoner had failed to show a violation of due process cognizable under section 1983. We followed *Parratt* in *City of Lake Worth v. Walton*, where we held that a police officer who was afforded means under state law for redress of the wrongful failure of his employer to promote him was not entitled to proceed under section 1983.

MUNICIPAL LIABILITY UNDER SECTION 1983

The appellants initially claim that the trial court erred in setting aside the jury's verdict. Their argument is two-pronged. First, they claim that Cowley's refusal to lift the stop-work order violated their right to continue construction of their project without unreasonable interference. Second, they claim that the City was responsible for Cowley's action since it deferred to his judgment on the issue of the stop-work orders. Considered together, appellants claim these actions gave rise to a cause of action under 42 U.S.C. section 1983 which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State ... subjects ... any citizen of the United States ... to the deprivation of rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law....

While cities have been held to be "persons" subject to liability under the provisions of this act, the kind of municipal activity that may give rise to liability has not been clearly defined. It has been held, for example, that a city may not be held liable under section 1983 simply on the basis of its common-law responsibility for the acts of its employees. On the other hand, cities have been held responsible in cases where an official city policy itself is shown to be the cause of the constitutional deprivation.

Recently, the United States Supreme Court, in *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988), sought to clarify the law of municipal liability under section 1983. Praprotnik was an architect employed by the city of St. Louis in a management-level city planning position who, after sucessfully appealing a temporary suspension to the city's Civil Service Commission, was transferred to a clerical position in another city agency before eventually being laid off the following year. In his section 1983 suit, Praprotnik claimed that the city violated his First Amendment rights by laying him off as a retaliatory action taken in response to his suspension appeal. He won at the trial court level. On appeal, the Eighth Circuit affirmed, finding that the jury had implicitly determined that Praprotnik's layoff was brought about by an unconstitutional city policy. *Praprotnik v. City of St. Louis*, 798 F.2d 1168 (8th Cir.1986). Defining a "policymaker" as one whose employment decisions are "final" in the sense that they are not subjected to de novo review by higher ranking officials, the Court of Appeals concluded that the city could be held liable under section 1983 for adverse personnel decisions made by the city supervisors. *Id.* at 1175.

The Supreme Court reversed, and in doing so attempted to clarify the principles set out in *Pembaur v. Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), wherein the Court had endeavored to refine the test for determining when a decision by a city employee on a single occasion may be sufficient to establish an unconstitutional municipal policy. 475 U.S. at 478–80, and nn. 7–8, 106 S.Ct. at 1297–99, and nn. 7–8. In *Pembaur*, a majority of the Court agreed that: 1) municipalities may be held liable under section 1983 only for "acts which the municipality has officially sanctioned or ordered." 475 U.S. at 480, 106 S.Ct. at 1298; 2) only those municipal officials who have "final policymaking authority" may subject the government to section 1983 by their actions. *Id.* at 483, 106 S.Ct. at 1300; 3) whether a particular official has "final policymaking authority" is a question of state law. *Ibid.*; 4) the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business. *Id.* at 482–83, and n. 12, 106 S.Ct. at 1299–1300, and n. 12. Noting that the identification of policymaking officials is a question of state law, and not a question of fact in the usual sense, the *Praprotnik* opinion stated that:

> The States have extremely wide latitude in determining the form that local government takes, and local preferences have led to a profusion of distinct forms. Among the many kinds of municipal corporations, political subdivisions, and special districts of all sorts, one may expect to find a rich variety of ways in which the power of government is distributed among a host of different officials and official bodies. See generally C. Rhyne, The Law of Local Government Operations §§ 1.3–1.7 (1980). Without attempting to canvass the numberless factual scenarios that may come to light in litigation, we can be confident that state law (which may include valid local ordinances and regulations) will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of a local government's business.

108 S.Ct. at 924–25.

The Court concluded that *Praprotnik* had failed to establish the existence of an unconstitutional municipal policy or show that the employees who had engineered his professional demise were municipal policymakers. On the contrary, the Court observed that: 1) the City Charter expressly authorized the Civil Service Commission to set and review employment policy as well as to correct improper personnel decisions; 2) Praprotnik had obtained at least partial relief through his several appeals to the Civil Service Commission; and 3) there was no indication that the Commission itself had ever authorized or permitted retaliatory transfers or layoffs. Under these circumstances the Court held that an unconstitutional municipal policy had not been demonstrated:

Simply going along with discretionary decisions made by one's subordinates, however, is not a delegation to them of the authority to make policy. It is equally consistent with a presumption that the subordinates are faithfully attempting to comply with the policies that are supposed to guide them. It would be a different matter if a particular decision by a subordinate was cast in the form of a policy statement and expressly approved by the supervising policymaker. It would also be a different matter if a series of decisions by a subordinate official manifested a "custom or usage" of which the supervisor must have been aware. See *supra*, [108 S.Ct.], at 925. In both those cases, the supervisor could realistically be deemed to have adopted a policy that happened to have been formulated or initiated by a lower-ranking official. But the mere failure to investigate the basis of a subordinate's discretionary decisions does not amount to a delegation of policymaking authority, especially where (as here) the wrongfulness of the subordinate's decision arises from a retaliatory motive or other unstated rationale. In such circumstances, the purpose of § 1983 would not be served by treating a subordinate employee's decision as if it were a reflection of municipal policy.

108 S.Ct. at 927.

THIS CASE

[1] We believe the analysis and holding in *Praprotnik* supports the trial court's ruling here. This case presents a classic example of the "rich variety of ways in which the power of government is distributed among a host of different officials and official bodies." *Praprotnik* at 925. The regulation of building and development in Florida is divided up in a complicated scheme among state, county and municipal governments. Development projects in Broward County are generally governed by the detailed provisions of the South Florida Building Code although there are additional layers of state, county and municipal laws and regulations that might affect or control a particular issue in dispute between a developer and the governmental body involved. The Building Code was enacted by the Florida Legislature and incorporated into the Broward County Charter to achieve both uniformity and quality in the building industry, and it contains a comprehensive and detailed government policy regulating construction in Broward County and the city of Coconut Creek. There is no dispute that its provisions govern the construction project in question herein.

The Building Code is similar, in our view, to the Civil Service regulations discussed in *Praprotnik*. As was the case with employment policy in *Praprotnik*, the city's policy on construction projects is set out in the Building Code. The appointment and duties of a building official and provisions for review of his decisions by the Board of Rules and Appeals are specifically enumerated in the Building Code.[2] It is the Build-

2. 201.1(a) BUILDING OFFICIAL

(1) APPOINTMENT, POWERS AND DUTIES OF A BUILDING OFFICIAL: There shall be appointed by the appointing authority a person qualified as set forth in Sec. 201 to serve as building official. The building official shall be the principal enforcing officer of this Code and it shall be his duty and responsibility to coordinate the work of all subordinate inspectors. The building official shall be subject to the powers vested in the Board of Rules and Appeals as set forth in Sec. 203 of this Code.

(4) STOP WORK ORDERS: Whenever any building work is being done contrary to the provisions of this Code or is being done in an unsafe or dangerous manner, the building official or his duly authorized representative may order such work stopped, or may order the

ing Code, rather than city officials, that grants and governs the authority of the building official to impose or lift stop-work orders. The Code not only provides guidance, it also provides for review of the building official's decisions, thus specifically denying him "final policy-making authority" over construction projects. Hence, in our view, the building official does not possess the kind of policy-making authority that would make the city liable for his actions under *Praprotnik*. We also note that there is no complaint here about the policy set out in the Code. Indeed, it is the alleged failure of the building official to comply with the Code that constitutes the basis of appellants' grievance.

person or persons engaged in the doing or causing of such work to be done and such persons shall immediately stop such work until arrangements, in compliance with the provisions of this Code and satisfactory to the building official or his duly authorized representatives have been made, at which time he may authorize the work to proceed.

203.5 POWERS (b)(1) The board shall have the power to affirm, modify or reverse the decision of the Building Official wherein such decision is on matters regulated by this Code.

203.7 COURT REVIEW: (a) Any person aggrieved by a decision of the Board of Rules and Appeals, whether or not a previous party to the decision, may apply to the appropriate court for a writ of certiorari to correct errors of law of such decision.

[2] We also do not believe that the action of other city officials in "simply going along" with the building official's decision on the stop-work orders constituted a delegation of policy-making authority sufficient to make the city liable under section 1983 as construed in *Praprotnik*. As noted above, the city's policy is contained in the Building Code, and the Code itself provides for another body's supervision of the building official's actions. There was no claim or evidence presented at trial of prior instances of abuse of authority that would demonstrate a de facto policy of the city sanctioning misconduct by the building official. Thus, although it appears that the building official may have acted improperly, it does not appear that his actions were related to any improper policy of the city, nor were they part of a series of wrongful acts tacitly approved as policy by the city. Under these circumstances we believe the trial court properly concluded that the city was not responsible under section 1983 for the building official's conduct.

SET-OFF CLAIM

[3] We believe this issue is rendered moot by our disposition of this appeal on its merits. Nevertheless, we find that the imposition of a set-off was correct. Prior to trial Raben–Pastel obtained settlements from the various engineers and architects named as codefendants whose negligent design created the defective construction which resulted in the stop work orders issued by appellees. In announcing the settlement in open court, appellants' counsel stated that "payment of this figure will result in general releases being exchanged for any and all claims between the parties." The settlement was not read into the record nor was it otherwise admitted into evidence.

In the Third Amended Complaint, before setting forth separate causes of action against each defendant, Raben–Pastel in its introductory paragraph alleged that "Plaintiff sues Defendants, jointly, severally, and individually...." While they did *not* include the settling defendants in their section 1983 action against the City and Cowley, appellants included claims for post-July 2nd damages in the claims they filed against the settling defendants on the theory that those defendants were liable for those damages under the principle of proxi-

mate cause. In ordering the set-off, the trial court relied on: 1) Raben–Pastel's complaint which claimed post-July 2nd damages from the settling defendants, for which the settling defendants were liable under the principle of proximate cause; and 2) the fact that the settlements did not apportion between damages occurring before and those which occurred after July 2, 1981.

Appellants argue that the trial court erred in awarding the set-off because appellees failed to prove that they shared a common liability to the plaintiff with the parties who had previously settled. Appellants cite *Dobson v. Camden*, 705 F.2d 759 (1983), *aff'd*, 725 F.2d 1003 (5th Cir.1984) (en banc) to support the contention that set-off was improperly awarded here. In that case Dobson sued Denny's Restaurant for false arrest and malicious prosecution after restaurant personnel summoned police when Dobson spent too much time in the bathroom. He also sued the City of Houston whose police officers beat him both before and after they removed him from Denny's. In holding that his settlement with Denny's should not be set-off against his verdict against the police officers, the Fifth Circuit noted that there was no joint liability between Denny's and the police officers for the injuries suffered by Dobson. "[N]o theory of tort liability exists to impose responsibility on Denny's for the excessive force used by Camden. Con-

spiracy between Denny's personnel and the police officers to inflict bodily injury on Dobson was not alleged and is not suggested." *Dobson*, at 1005. The key distinction in this case is that there was a claim of joint liability against the appellees and the settling defendants for the failure of the project. Theoretically, a jury could have placed the blame on all the defendants for the project's demise.

Appellants further submit that set-off was unnecessary because the jury verdict already reflected the apportionment of damages between the negligent settling defendants and appellees. While it is true that the judge instructed the jury to award only those damages against Cowley and the City which arose from their post-July 2nd conduct, the problem is that there was no apportionment of damages in the settlement with the other defendants, who were alleged to also be responsible for the subsequent financial ruin of the project. Under these circumstances we do not believe the trial court erred in granting the City and Cowley a set-off.

Accordingly, we affirm the actions of the trial court.

DELL and STONE, JJ., concur.

OPINION ON REHEARING

PER CURIAM.

We deny the petition for rehearing but certify the following question as one of great public importance to the Florida Supreme Court:

> May a municipality be held liable to an owner-developer of a building project under 42 U.S.C. section 1983 for the wrongful refusal of the municipality's chief building official to withdraw a stop-work order on the project?

ANSTEAD, DELL and STONE, JJ., concur.

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY,
FLORIDA

CASE NO. 82-22427 CL

RABEN PASTAL, etc., et al.,

Plaintiffs,

vs.

CITY OF COCONUT CREEK, FLORIDA, JAMES COWLEY and DONALD BRYAN,

Defendants.

FINAL JUDGMENT

THIS CAUSE was heard before the Court on the Renewed Motion for Directed Verdict filed by the Defendants, CITY OF COCONUT CREEK, FLORIDA, a municipal corporation, and JAMES COWLEY. Upon

consideration of the Renewed Motion for Directed Verdict and in light of the granting of the Directed Verdict, pursuant to this Court's Order granting said Motion, it is

ORDERED AND ADJUDGED that the Plaintiff, RABEN PASTAL, a joint venture comprised of RABEN BUILDERS, INC., and PASTAL CONSTRUCTION, INC., Florida corporations, take nothing by this action and that Defendants, CITY OF COCONUT CREEK, FLORIDA, a municipal corporation, and JAMES COWLEY, go hence without day. This Court shall retain jurisdiction to consider, upon motion and hearing, Defendants' entitlement to be awarded costs and attorneys' fees.

DONE AND ORDERED, in Chambers, at the Broward County Courthouse, Fort Lauderdale, Broward County, Florida, on this 8 day of August, 1986.

OTIS FARRINGTON
Circuit Court Judge

Copies furnished:

Ronald F. Shapiro, Esquire
Robert H. Schwartz, Esquire
Phillip Blackman, Esquire
Ernest A. Kollra, Esquire
Paul S. Stuart, Esquire
Robert Burlington, Esquire

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 82-22427 CL

RABEN PASTAL, etc., et al.,

Plaintiffs,

vs.

CITY OF COCONUT CREEK, FLORIDA, JAMES COWLEY and DONALD BRYAN,

Defendants.

ORDER GRANTING RENEWED MOTION FOR DIRECTED VERDICT

THIS CAUSE was heard before the Court on the Renewed Motion for Directed Verdict filed by the Defendants, CITY OF COCONUT CREEK, FLORIDA, a municipal corporation, and JAMES COWLEY, and the Court having heard argument of counsel, reviewed exten-

sive memoranda and case law, and having considered the points raised,

ORDERS and ADJUDGES:

The Renewed Motion for Directed Verdict filed by the Defendants, CITY OF COCONUT CREEK, FLORIDA, and JAMES COWLEY, is hereby granted for the reason that Plaintiffs' claim under 42 U.S.C. Sec. 1983 constitutes a procedural due process claim and not a substantive due process claim. This Court is of the opinion that Plaintiffs had an adequate remedy under Florida state law and are therefore precluded from relief under 42 U.S.C. Sec. 1983. See City of Lake Worth v. Walton, 462 So.2d 1134 (Fla. 4th DCA 1984); Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908 (1981).

In all other respects Defendants' Motion for Judgment Notwithstanding the Verdict and/or Renewed Motion for Directed Verdict; and in the Alternative Motion for New Trial is denied.

DONE AND ORDERED, in Chambers, at the Broward County Courthouse, Fort Lauderdale, Broward County, Florida, on this 8 day of August, 1986.

OTIS FARRINGTON
OTIS FARRINGTON
Retired Circuit Judge on assignment to active judicial service.

Copies furnished:

Ronald F. Shapiro, Esquire
Robert H. Schwartz, Esquire
Phillip Blackman, Esquire
Ernest A. Kollra, Esquire
Paul S. Stuart, Esquire
Robert Burlington, Esquire

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 83-11789

RABEN PASTAL, etc., et al., Plaintiffs, -vs- CITY OF COCONUT CREEK, Florida, and JAMES COWLEY	VERDICT

We the Jury, return the following verdict:

1. Was there a violation of the constitutional rights of the Plaintiff, Raben-Pastal, by the Defendant James Cowley?

Yes YES

No _____

If the answer to Question 1 is "No" proceed no further. If the answer to Question 1 is "Yes", answer Question 2.

2. Do you find that the actions of James Cowley were a legal cause of damage to the Plaintiff, Raben Pastal?

Yes YES

No _____

If the answers to Questions 1 and 2 are "Yes" the jury should enter the amount of damages that it finds to have been caused by the constitutional deprivation in the blank below:

$2,500,000

3. Were the actions of James Cowley representative of an official policy, custom or practice of the City of Coconut Creek?

Yes YES

No _____

4. Do you find that James Cowley's conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known?

Yes YES

No _____

/s/

Foreperson for the Jury
January 27, 1986

STATE OF FLORIDA
BROWARD COUNTY

I DO HEREBY CERTIFY the written and foregoing is a true and correct copy of the original as it appears on record and file in the office of the Circuit Court Clerk of Broward County, Florida.

WITNESS my hand and Official Seal at Fort Lauderdale, Florida this 13 day of November, 1986.

Robert E. Lockwood, Clerk

/s/

Deputy Clerk

Filed In Circuit Court
ROBERT E. LOCKWOOD
CLERK
ON JAN 27, 1986
BY MARC A. WOLF

Supreme Court, U.S.
FILED
JUN 12 1991
OFFICE OF THE CLERK

(2)

No. 90-1755

In The

Supreme Court of the United States

October Term, 1990

RABEN-PASTEL, a Joint Venture,
comprised of RABEN BUILDERS, INC.
and PASTAL CONSTRUCTION COMPANY,

Petitioners,

v.

CITY OF COCONUT CREEK, a Florida
Municipal Corporation, and JAMES COWLEY

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of Florida

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION OF RABEN-PASTAL, et al., FOR WRIT OF CERTIORARI

ROBERT H. SCHWARTZ
GUNTHER & WHITAKER, P.A.
Attorneys for Respondents
Post Office Box 14608
Fort Lauderdale, Florida 33302
(305) 523-5885

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESTATEMENT OF THE QUESTION PRESENTED

WHETHER THE SUPREME COURT OF FLORIDA PROPERLY DETERMINED THAT MUNICIPAL LIABILITY DOES NOT ATTACH TO THE ACTS OF ITS CHIEF BUILDING OFFICIAL WHERE AS A MATTER OF STATE LAW THE MUNICIPAL CHIEF BUILDING OFFICIAL IS NOT THE FINAL POLICYMAKING AUTHORITY?

TABLE OF CONTENTS

Page

RESTATEMENT OF QUESTION PRESENTED..... i

TABLE OF AUTHORITIES..... iii

STATEMENT OF THE CASE..... 1

SUMMARY OF ARGUMENT..... 3

ARGUMENT FOR DENYING THE PETITION..... 3

TABLE OF AUTHORITIES

Page

City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988).....3, 4, 5, 6

Howell v. Evans, 922 F.2d 712 (11th Cir. 1991)..... 6

Jett v. Dallas Independent School District, 485 U.S. 112, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989).....3, 5

Manor Healthcare Corp. v. Lomelo, 929 F.2d 633 (11th Cir. 1991) 6

Williams v. Butler, 863 F.2d 1398 (8th Cir. 1988)..... 5

Worsham v. City of Pasadena, 881 F.2d 1356 (5th Cir. 1989)..... 6

STATEMENT OF THE CASE

Because of the justified concerns relating to the safety of two (2) buildings under construction in the City of Coconut Creek, Florida, James Cowley, the Chief Building Inspector for the City, issued a stop work order.

The stop work order was issued pursuant to the South Florida Building Code which by legislative enactment is part of the laws of the State of Florida and is applicable to all the municipalities in Broward County, Florida. As the City of Coconut Creek is a municipality within Broward County, this condominium development project was subject to the provisions of the South Florida Building Code.

During the pendency of the stop work order two (2) issues arose that brought into question the propriety of the continuation of the stop work order. The first related to whether an engineer who had previously been involved in the project could act as a "special inspector" pursuant to § 305 of the Code. Cowley's concern that this created a serious conflict of interest resulted in the filing of an appeal with the Board of Rules and Appeals pursuant to the administrative review procedure incorporated into the South Florida Building Code. Petitioners also filed a petition for writ of mandamus in the Circuit Court of Broward County. The Board of Rules and Appeals met on July 20, 1981 and denied petitioners' appeal. (R. 1708-1740). Rather than availing themselves of the appeal provisions contained within the South Florida Building Code, the petitioners chose to pursue the mandamus action. When the petition for writ of mandamus was denied, no appeal was taken.

A second appeal to the Board of Rules and Appeals resulted from a controversy that arose following an agreement that load tests would be conducted on the buildings to insure that the previously discovered problems had been remedied. Following a satisfactory result from the first load test petitioners sought to avoid the second load test and when Cowley insisted that the second test was necessary another appeal was filed. This appeal was heard on November 12, 1981 at which time the Board of Rules and Appeals again denied the appeal. (Joint Plaintiffs' Exhibits 1A, 1B and 2). Again the petitioners failed to pursue the judicial review procedure provided by the Code, and upon successful completion of the load test the stop work orders were lifted and construction resumed.

Following a jury verdict in favor of the petitioners against the City and Cowley, the trial court granted the defendants' renewed motion for directed verdict. (R. 2063).

The appeal that followed resulted in an affirmance by the intermediate appellate court, but upon motion for rehearing that court (the Fourth District Court of Appeal) certified the following question to the Florida Supreme Court:

> May a municipality be held liable to an owner-developer of a building project under 42 U.S.C. §1983 for the wrongful refusal of the municipality's chief building official to withdraw a stop work order on the project?
>
> (A-37)

The Florida Supreme Court answered the certified question as to this case in the negative. (A-18). It is from

the adverse decision on this issue that the petition is based.

SUMMARY OF ARGUMENT

Despite the characterization of the questions presented for review by the petitioners, this petition seeks to have this Court reject a determination by the Florida Supreme Court on a question of state law. This is directly contrary to the case law in which this Court has made it repeatedly and abundantly clear that the issue whether a particular official has final policymaking authority for purposes of determining municipal liability pursuant to 42 U.S.C. §1983 is a question of state law.

What the petition seeks is to have this Court apply the long rejected doctrine of *respondeat superior* to the City of Coconut Creek.

The issue of individual liability is in reality an afterthought as it was not discussed by the Fourth District Court of Appeal and consideration of it was expressly rejected by the Florida Supreme Court. (A-18, n.6).

ARGUMENT FOR DENYING THE PETITION

MUNICIPAL LIABILITY

Whether a particular official has final policymaking authority is a question of state law. The recent decisions of this Court in *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) (plurality opinion) and *Jett v. Dallas Independent School District*, 485 U.S. 112,

109 S.Ct. 2702, 105 L.Ed.2d 598 (1989) authoritatively determined "where policymaking authority lies for purposes of § 1983" is "a question of *state law.*" *Id.* at 109 S.Ct. 2723. (Emphasis added).

The determination by the Florida Supreme Court that James Cowley did not possess final authority to establish municipal policy under Florida law was precisely what this Court contemplated its responsibility to be:

> Without attempting to canvass the numberless factual scenarios that may come to light in litigation, we can be confident that *state law (which may include valid local ordinances and regulations)* will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of a local government's business. (emphasis supplied).

Praprotnik, supra, at 108 S.Ct. 924-925.

The *Praprotnik* plurality expressly rejected using state law as merely "an appropriate starting point" by adhering unmistakably to the premise that because of the inherent diversities of local government "the identification of the policymaking officials is not a question of federal law. . . . " *Id.* at 108 S.Ct. 924.

Any other approach would place municipalities in a position of sufficient uncertainty which "could easily lead to results that would be hard in practice to distinguish from the results of a regime governed by the doctrine of *respondeat superior.*" *Id.* at 108 S.Ct. 924, n.1.

The expressed confidence that state law will properly identify policymaking officials or bodies was satisfied by the considered approach taken by the Florida Supreme Court in carrying out its appointed task.

The Florida Supreme Court's analysis and conclusion are consistent with the mandate of *Praprotnik* and *Jett* and the suggestion that the decision creates a conflict ignores a careful reading of the respective opinions.[1]

Reliance on the cases cited by the petitioners from the federal courts of appeal on the issue of delegation of authority is misplaced. Application of the delegation theory of municipal liability in this case would amount to the application of the doctrine of *respondeat superior* to the City for the acts of its employees.

Incomplete delegation of authority with the right of review will not result in municipal liability. *Williams v. Butler*, 863 F.2d 1398, 1404 (8th Cir. 1988).

In *Manner Healthcare Corp. v. Lomelo*, 929 F.2d 633 (11th Cir. 1981), a grant of summary judgment in favor of the City of Sunrise, Florida on the issue of municipal liability was affirmed by the Eleventh Circuit Court of Appeals.

---

[1] Petitioners' failure to cite to *Jett* is perhaps significant. Were this Court to determine that Cowley was the final policymaker, the Court would then have to confront the remand situation presented in *Jett*, as the question of final policymaking authority was in this case, as in *Jett*, submitted to the jury. (R. 1872-1873). Surely the expertise of the Supreme Court of Florida is equal to that of the United States Court of Appeal in determining the status of state law. *Jett, supra*, at 109 S.Ct. 2724.

The distinction between the *Jett* situation and the case at bar is the deference to the determination of state law which has already occurred herein.

The district judge's determination that John Lomelo, as mayor of the City of Sunrise, was not under Florida law the final policymaker. This determination was made despite proof that "Lomelo's de facto powers caused the city council to defer in substantial part to his judgment." *Id.* at 637-638.

The district judge determined that as the city charter gave the city council the power to override his veto on zoning matters, he was not under the charter the ultimate policymaking authority on zoning matters under state law. *See also Howell v. Evans*, 922 F.2d 712, 724-725 (11th Cir. 1991); *Worsham v. City of Pasadena*, 881 F.2d 1356 (5th Cir. 1989).

Just as the Sunrise City Charter precluded Mayor Lomelo from being the final policymaker in Sunrise, the South Florida Building Code as codified by the Florida Legislature precluded James Cowley from being the final policymaker in the adjacent City of Coconut Creek. The delegation of power and city council deference arguments advanced by petitioners herein were expressly rejected by the Court in *Manor Healthcare, supra*, at 638.

As the court held in *Lomelo*; "[t]o hold the city liable for Lomelo's actions would in essence subject the city to vicarious liability for Lomelo's personal acts. *Monell* and its progeny prohibit us from so doing." *Id.* at 638; *Praprotnik, supra*, at 108 S.Ct. 924, n.1.

The Florida Supreme Court properly held that James Cowley was not the final policymaker as the South Florida Building Code precluded him from possessing "final authority to establish municipal policy." (A-18). Therefore, municipal liability cannot result from his actions.

INDIVIDUAL LIABILITY

The issue of Cowley's individual liability was not part of the question certified to the Florida Supreme Court and consideration of that and other ancillary issues were expressly rejected by the court. (A-18, n.6).

There is no reason for this Court to deal with this issue as it was not actively litigated in the Florida District Court of Appeal and was expressly rejected as an issue by the Florida Supreme Court. (A-18, n.6.). Not every ancillary issue raised by the parties should be considered by this Court.

CONCLUSION

Respondents request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

By /s/ Robert H. Schwartz
ROBERT H. SCHWARTZ
GUNTHER & WHITAKER, P.A.
Attorneys for Respondents
Post Office Box 14608
Fort Lauderdale, Florida 33302
(305) 523-5885

Supreme Court, U.S.
FILED
JUN 27 1991
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NO. 90-1755

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RABEN-PASTAL, a Joint Venture, comprised of RABEN BUILDERS, INC. and PASTAL CONSTRUCTION COMPANY,

Petitioners,

v.

CITY OF COCONUT CREEK, a Florida Municipal Corporation, and JAMES COWLEY,

Respondents.

ON PETITION
FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

PETITIONERS' REPLY BRIEF

GREENBERG, TRAURIG, HOFFMAN, LIPOFF, ROSEN & QUENTEL, P.A.
Byron G. Petersen, Esq.
Attorneys for Petitioners
500 East Broward Boulevard
Suite 1350
Fort Lauderdale, Florida 33394
(305) 765-0500

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. THE CITY IS LIABLE UNDER 42 U.S.C. § 1983 BECAUSE IT EXPRESSLY DELEGATED ITS AUTHORITY CONCERNING THE LIFTING OF STOP-WORK ORDERS TO ITS CHIEF BUILDING OFFICIAL OR RATIFIED HIS DECISION 1

II. THE CHIEF BUILDING OFFICIAL IS NOT IMMUNE FROM LIABILITY UNDER 42 U.S.C. § 1983 EVEN IF HE IS NOT THE "FINAL POLICYMAKER" SUFFICIENT TO IMPOSE LIABILITY ON THE CITY 4

CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES

City of St. Louis v. Praprotnik,
485 U.S. 112, 108 S. Ct. 915,
99 L. Ed. 2d 107 (1988) 2, 3

Jett v. Dallas Independent School Dist.,
485 U.S. 112, 109 S. Ct. 2702,
105 L. Ed.2d 598 (1989) 3

Manor Health Care Corp. v. Lomelo,
929 F.2d 633 (11th Cir. 1991) 2

Pembauer v. Cincinnati,
475 U.S. 469, 106 S. Ct. 1292,
89 L. Ed. 2d 452 (1986) 4

Williams v. Butler,
863 F.2d 1398 (8th Cir. 1988) 2, 3

Worsham v. City of Pasadena,
881 F.2d 1336 (5th Cir. 1989) 3

STATUTES

42 U.S.C. § 1983 ..... 1, 2, 3, 4

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

Raben-Pastal, a Joint Venture,
comprised of Raben Builders, Inc.
and Pastal Construction Company,

Petitioners,

v.

City of Coconut Creek, a Florida
Municipal Corporation, and
James Cowley,

Respondents.

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

I. THE CITY IS LIABLE UNDER 42 U.S.C. § 1983 BECAUSE IT EXPRESSLY DELEGATED ITS AUTHORITY CONCERNING THE LIFTING OF STOP-WORK ORDERS TO ITS CHIEF BUILDING OFFICIAL OR RATIFIED HIS DECISION.

Respondents ignore the uncontroverted evidence which mandates the liability of the City of Coconut Creek, Florida ("City") under § 1983 under this Court's decisions by suggesting that Petitioners could not prevail unless this Court

interpreted state law contrary to the Florida Supreme Court. That is not correct. Petitioners do not assail the Florida Supreme Court's finding that the Chief Building Official was not the *de jure* final policymaker. However, the uncontradicted evidence proved to the jury that the Chief Building Official was the *de facto* final policymaker in the City concerning the lifting of stop-work orders because the Board of Rules and Appeals, the *de jure* final policymaker for the City, delegated complete, unfettered authority to him or ratified his decision. (*Cochenour*, Jan. 8 T. 25; *Stewart*, Jan. 9 T. 92; *Cowley*, Jan. 13 T. 181-184). The City cannot insulate itself from liability under § 1983 "simply by delegating their policymaking authority . . . ." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S. Ct. 915, 925, 99 L.Ed.2d 107 (1988).

Respondents rely upon cases which actually support Petitioners' argument to this Court. In *Manor Health Care Corp. v. Lomelo*, 929 F.2d 633 (11th Cir. 1991), the Eleventh Circuit Court of Appeals refused to impose § 1983 liability on the City of Sunrise for the bribery and extortive activities of its Mayor. The Eleventh Circuit expressly noted that the City of Sunrise did not have a "custom or practice" which allowed the Mayor to function without any supervision or review with regard to zoning. *Id.* at 638. Moreover, the Eleventh Circuit noted that the Mayor was not executing any City policy when he violated the law regarding bribery and extortion. *Id.* In stark contrast, the lower courts herein ignored and did not discuss the undisputed evidence that the Board of Rules and Appeals for the City of Coconut Creek had a "custom or practice" of delegating its, *de jure*, "final policymaking authority" to the Chief Building Official.

Similarly, the Eighth Circuit Court of Appeals in *Williams v. Butler*, 863 F.2d 1398 (8th Cir. 1988) imposed liability under § 1983 on the City of Little Rock, Arkansas,

for the acts of a municipal court judge in firing a municipal court clerk. Unlike the lower courts herein, the Eighth Circuit correctly found that "an absolute delegation of authority" regarding employment matters to the municipal court judge established by the evidence was sufficient to impose liability under § 1983 upon the City of Little Rock. Thus, *Williams* fully supports Petitioners' argument that the "absolute delegation" established by the evidence is sufficient to impose liability on the City of Coconut Creek.

The Fifth Circuit in *Worsham v. City of Pasadena*, 881 F.2d 1336 (5th Cir. 1989), held that the existence of "meaningful review" by the City Council indicated that city officials who discharged a City employee were not the "final policymakers". Therefore, the Fifth Circuit necessarily found that there had not been "absolute delegation" to the City officials. However, the Fifth Circuit expressly noted that a finding of municipal liability may be proper if the "theoretical right of review . . . [was] ineffective and meaningless . . . ." Id. at 1341. Because the sole evidence in the case *sub judice* conclusively demonstrates that any review by the Board of Rules and Appeals was "ineffective and meaningless", *Worsham* does not support Respondents' argument.

Respondents also suggest that Petitioners' failure to cite *Jett v. Dallas Independent School Dist.*, 485 U.S. 112, 109 S. Ct. 2702, 105 L. Ed.2d 598 (1989), supports this Court's deference to the Florida Supreme Court's determination as to who is the "final policymaker" under Florida law. *Id.* at 2723-24. However, the lower courts in *Jett* did not have the benefit of this Court's decisions in *Pembauer v. Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L.Ed.2d 452 (1986) and *Praprotnik* when they decided the case, including the *de facto* exceptions to *de jure* final policymaking authority of delegation and ratification. This Court remanded *Jett* because the lower appellate courts had decided the case before these

seminal decisions. In contrast, both lower appellate courts herein discussed the decisions in *Pembauer* and *Praprotnik*. However, they ignored the uncontradicted evidence and jury findings which established the *de facto* exceptions recognized by this Court -- delegation and ratification.

II. THE CHIEF BUILDING OFFICIAL IS NOT IMMUNE FROM LIABILITY UNDER 42 U.S.C. § 1983 EVEN IF HE IS NOT THE "FINAL POLICY-MAKER" SUFFICIENT TO IMPOSE LIABILITY ON THE CITY.

Respondents apparently concede that the issue of individual liability under § 1983 was wrongfully decided, but argue that the Chief Building Official should be immune from liability because neither the Fourth District nor the Florida Supreme Court gave the issue of individual liability the same (albeit wrong) consideration as municipal liability. Respondents do not argue, not can they, that the lower courts' implicit rulings -- that the Chief Building Official is immune from liability for his constitutional tort because he lacked "final policymaking authority" sufficient to subject the City to liability for his acts -- are correct. Petitioners submit that the lower courts cannot preclude consideration by this Court of the issues of individual liability merely by refusing to address the issue.

CONCLUSION

Petitioners, RABEN-PASTAL, respectfully submit that the record cries out for a reversal less one more constitutional deprivation pass unnoticed as the law of the land. Petitioners respectfully request that the Court grant their Petition for Writ of Certiorari and direct the parties to submit briefs on the merits.

Respectfully submitted,

GREENBERG, TRAURIG,
HOFFMAN, LIPOFF, ROSEN &
QUENTEL, P.A.
Byron G. Petersen, Esq.
Attorneys for Petitioner
500 East Broward Boulevard, Ste. 1300
Fort Lauderdale, Florida 33394
Telephone: (305) 765-0500

By:
BYRON G. PETERSEN
FLORIDA BAR NO. 220434